No. 93-1151

In the Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL ELECTION COMMISSION, PETITIONER

v.

NRA POLITICAL VICTORY FUND, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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ARGUMENT

1. a. Respondents have failed entirely to present any basis for concluding that the decision below, which held unconstitutional a provision of an act of Congress and invalidated the structure of a federal agency charged with civil enforcement of the laws protecting the integrity of our national elections, is not important enough to warrant plenary review by this Court. Respondents argue (Opp. 3-4) that there are no other agencies structured like the Commission, but we have shown (Pet. 16) that the Sentencing Commission, reviewed by this Court in *Mistretta v. United States*, 488 U.S. 361 (1989), also included an *ex officio* member from another branch. More importantly, most of the cases in which this Court has reviewed separation-of-powers challenges have in-

volved structural features that were similarly uncommon. *See, e.g., Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991); *Mistretta v. United States*, 488 U.S. 361 (1989); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Morrison v. Olson*, 487 U.S. 654 (1988); *Bowsher v. Synar*, 478 U.S. 714 (1986). The invalidation of a federal statute is not diminished in importance by Respondents' view (Opp. 4) that the agency structure enacted by Congress is not really needed for adequate administration of the law. Deciding whether a duly enacted federal statute should be invalidated for violation of the Constitution's separation-of-powers requirement is "a responsibility of this Court as ultimate interpreter of the Constitution." *United States v. Nixon*, 418 U.S. 683, 704 (1974) (internal quotation marks omitted).

b. Respondents concede that "it is true that the court of appeals' ruling is, in fact, 'unprecedented' " (Opp. 3). They have not attempted to controvert the Commission's showing (Pet. 18-19) that the unprecedented separation-of-powers analysis of the decision below conflicts with the law of two other circuits; they do attempt (Opp. 11 n.14) to distinguish those cases on the basis of the titles, rather than the powers, of the *ex officio* members of the Commission, but this Court has admonished that separation-of-powers analysis does not turn on labels. *See Mistretta*, 488 U.S. at 393; *Morrison*, 487 U.S. at 689.

Respondents also present no basis for their hyperbolic claim (Opp. 9) that a decision allowing non-voting *ex officio* members to serve on this bipartisan independent agency, performing both legislative and executive functions, would necessarily authorize Congress to place its agents "throughout the Executive

Branch," even "at the President's Cabinet table." Because the separation-of-powers doctrine focuses upon the extent to which a statutory provision "prevents the Executive Branch from accomplishing its constitutionally assigned functions," *Mistretta*, 488 U.S. at 361 (*quoting Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977)), the particular relationship of a function to the President's constitutional role may be determinative. *See Morrison*, 487 U.S. at 690 ("[T]here are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role"). Upholding the constitutionality of *ex officio* members in the particular context of this independent agency would not require the Court to decide where the line must be drawn, any more than it did in *Morrison*.

In sum, Respondents cannot alter the facts supporting the Commission's petition. A federal court has held unconstitutional a provision of an act of Congress and has invalidated the composition of a federal agency charged with civil enforcement of an important area of federal law. It has done so on the basis of a novel expansion of the separation-of-powers doctrine beyond this Court's precedents and in conflict with the views of two other circuits. Whether the Court ultimately affirms or reverses the ruling of the court of appeals, such a decision clearly warrants plenary review.

2. Although they filed no cross-petition for writ of certiorari, Respondents list (Opp. i) three additional issues, not presented in the petition, that they ask this Court to review. The court of appeals explicitly rejected (Pet. App. 8a-12a) Respondents' arguments on the two constitutional issues (questions 2 and 3),

while Respondents' arguments on the merits of the case (question 4) were rejected by the district court, whose findings have not yet been reviewed by the court of appeals.

Respondents assert (Opp. 14) that these additional issues represent alternative grounds for affirming the judgment below. However, none of these issues is a "necessary predicate to the resolution of the question[s] presented in the petition," *Caspari v. Bohlen*, No. 92-1500, 1994 WL 50780, at *5 (U.S. Feb. 23, 1994), and this Court need not entertain issues alleged to be alternative grounds for affirmance if they are not "of sufficient general importance to justify the grant of certiorari," *United States v. Nobles*, 422 U.S. 225, 241 n.16 (1975). Respondents have not claimed that the lower court decision on any of these issues is in conflict with the precedents of this Court or any other lower court, nor have they shown any other reason why the resolution of these issues against them is "of sufficient general importance" to warrant a grant of certiorari. Accordingly, we suggest that it would serve the interests of judicial economy for the Court to avoid unnecessary briefing and consideration of these extraneous issues by explicitly limiting a grant of certiorari in this case to the issues specified in the petition. *See also, Yee v. City of Escondido*, 112 S.Ct. 1522, 1532, 1533 (1992).

a. Respondents' summary assertion (Opp. 18-19) that the district court erred in finding that they violated the Act involves only the application of the statutory terms and the Commission's regulations to the particular facts of this case. The district court's findings were in accord with the Commission's expert construction of the statute, and Respondents cite no adverse judicial precedent. Such an issue plainly does

not warrant review by this Court, particularly since this judgment would be subject to the usual review by the court of appeals upon remand if this Court reinstates the Commission's lawsuit.

b. Respondents again cite no authority supporting their bizarre argument (Opp. 14) that it is a violation of separation-of-powers requirements for a statute to contain no provision governing the President's authority to remove agency members. This Court has long recognized Congress's authority to create independent agencies and "fix the period during which [their members] shall continue in office, and to forbid their removal except for cause in the meantime," *Morrison*, 487 U.S. at 687 (*quoting Humphrey's Executor v. United States*, 295 U.S. 602 (1935)). The Court has also acknowledged that statutory limits on the presidential power to remove some executive officials might be constitutionally suspect. *Morrison*, 487 U.S. at 690.[1] But neither this Court, nor any lower court, has ever remotely suggested that the absence of any statutory provision governing the President's removal power could be unconstitutional. To the contrary, this Court cited the absence of any provision in this Act "specify[ing] a removal procedure" for Commissioners as being typical of "[t]he statutes establishing independent agencies," and contrasted it with the features of the removal provision found unconstitutional in *Bowsher v. Synar*, 478 U.S. at 725 n.4.

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[1] This Court has never found special provisions for continuing presidential control of the sort discussed in *Morrison*, 487 U.S. at 696, quoted by Respondents (Opp. 16), to be constitutionally required for independent agencies whose members, unlike the independent counsel, are appointed by the President.

Respondents in effect ask this Court to *infer* from statutory silence some unstated limits on the President's power to remove Commissioners, and then to hold such limits unconstitutional. But this Court will construe an ambiguous statute in a manner that avoids, rather than creates, such constitutional issues, *see, e.g., Morrison*, 487 U.S. at 682, and the lower courts have construed such silence in similar statutes to permit presidential removal for cause. *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677 (10th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989); *SEC v. Bilzerian*, 750 F. Supp. 14 (D.D.C. 1990). However, because there is no reason for this Court to anticipate whether, or to what extent, the Act should be construed to limit the President's removal power until a President seeks to exercise it, this issue is not even ripe for consideration on the facts of this case.

c. The provision in 2 U.S.C. § 437c(a)(1) that "no more than 3 [of the six] members of the Commission" appointed by the President "may be affiliated with the same political party" simply sets the necessary qualifications for the members of a bipartisan agency. While the President is entitled, pursuant to Article II, section 2, clause 2 of the Constitution, to choose the individuals to nominate as Commissioners, it has long been recognized that "[i]t is entirely proper for Congress to specify the qualifications for an office it has created." *Bowsher v. Synar*, 478 U.S. at 740 (Stevens, J., concurring). *See also, Myers v. United States*, 272 U.S. 52, 265-274, nn.35, 36 (Brandeis, J., dissenting). Such bipartisanship requirements have long been common for independent agencies,[2] and this Court has specifically recognized

[2] Congress has enacted bipartisan structures for, *e.g.*, the Securities & Exchange Commission, 15 U.S.C. § 78d(a); the Federal Trade Commission, 15 U.S.C. § 41; the Federal Energy Regulatory Commission, 42 U.S.C. § 7171(b); the Equal Employment Opportunity Commission, 42 U.S.C. § 2000e-4(a); the Interstate Commerce Commission, 49 U.S.C. § 10301(b); and the United States Sentencing Commission, 28 U.S.C. § 991(a), which was found constitutional in *Mistretta v. United States*, 488 U.S. 361 (1989).

the value of an "inherently bipartisan" agency to "decide issues charged with the dynamics of party politics." *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981). Respondents cite no authority whatever that even remotely supports their argument (Opp. 17-18) that this long-established legislative practice might be unconstitutional.

In fact, nothing in the Act suggests that the bipartisanship requirement is a judicially enforceable restriction on the President's power to nominate individuals to become Commissioners, rather than a directory provision enforceable only through the Senate's confirmation power. The Executive Branch has repeatedly opined that such provisions are merely "advisory," *Statement on Signing the Intelligence Authorization Act, Fiscal Year 1990*, 25 Weekly Comp. Pres. Doc. 1851, 1852 (Nov. 20, 1989), and thus do "not constrain the President's constitutional authority to appoint officers of the United States," *Statement on Signing the Cranston-Gonzalez National Affordable Housing Act*, 26 Weekly Comp. Pres. Doc. 1930, 1931 (Nov. 28, 1990). Since the Act plainly permits such a construction, the courts would be obligated to adopt it if a legally binding restriction were thought unconstitutional. *See supra* p. 6. But because all the Commissioners who participated in this case were nominated by the President and confirmed by the Senate, resolution of this question of

statutory construction would have no effect on the outcome of this case. Thus, like the question of the President's removal power, this issue is not ripe for consideration on the facts of this case.

CONCLUSION

For the reasons stated above and in the Commission's petition, the Federal Election Commission's petition for a writ of certiorari should be granted, and the issues to be reviewed should be limited to those stated in the petition.

Respectfully submitted,

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